IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON THE MERITS

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October 8, 1952.

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OPINIONS BELOW

The Trial Examiner's recommendations and conclusions of law appear in the Record at page 2203. The majority and dissenting opinions of the Federal Trade Commission (R. 2265-82) are reported at 44 F. T. C. 390. The opinion of the Court of Appeals for the Seventh Circuit (R. 2308-15) is reported at 191 F. 2d 786.

*Respondent has filed a separate brief on jurisdiction.

STATUTES INVOLVED

The applicable portion of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows (15 U. S. C § 13):

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . .
>
> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebut-

ting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The applicable portion of Section 10 of the Administrative Procedure Act, is as follows (5 U. S. C. § 1009):

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTION PRESENTED

Whether the court below erred in reversing that portion of the Commission's order (Part III) which was entered under Section 2(a) of the Clayton Act when, upon its review of the record as a whole, the court concluded that the findings upon which it was based were not supported by substantial evidence.

STATEMENT

The Proceedings Below

The proceeding before the Commission was instituted by the issuance of the Commission's complaint (R. 2-11) against respondent (M-H), dated February 23, 1943. Count III of the complaint charged violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.* It alleged that M-H, a manufacturer of automatic temperature controls, had sold its controls to some of its oil burner manufacturer customers at prices different from those charged others of such customers, with resulting unlawful discrimination in price.

Hearings were conducted before a Trial Examiner from August, 1943, to October, 1945. On February 21, 1946, the Trial Examiner filed his Report (R. 2166-2203), wherein he recommended that the charges set forth in Count III be dismissed (R. 2203). The latter recommendation was based upon the Trial Examiner's findings that

> (1) the differentials in M-H's prices did not tend to injure competition either among M-H and its competitors or among M-H's customers; and
>
> (2) in any event, the differentials in M-H's prices were justified, some because of differences in costs and the balance because made in good faith to meet the competition of other control manufacturers.

The majority of the Commission agreed that some of M-H's varying prices were justified by differences in M-H's

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*Counts I and II of the complaint, and Parts I and II of the Commission's order entered thereon, are not involved in this proceeding.

costs, but declined to follow the Trial Examiner's recommendation that Count III should be dismissed. Commissioner Mason, dissenting, agreed with the Trial Examiner that Count III should be dismissed (R. 2276-82). The Commission's order to cease and desist was issued January 14, 1948 (R. 2262-65).

Part III of that order (R. 2264), which was entered pursuant to Count III of the complaint, directs that M-H

> ". . . forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—
>
> "1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

On March 11, 1948, M-H filed with the Court of Appeals for the Seventh Circuit its petition to review and set aside the order of the Commission (R. 2283-98).

On July 5, 1951, the Court of Appeals handed down its opinion (R. 2308-15) unanimously reversing Part III of the order and dismissing Count III of the complaint, holding that, on the entire record, the Commission acted arbitrarily when it rejected the findings of the Trial Examiner that M-H's pricing practices did not tend to injure competition. That being the basis for its decision, the court did not reach

the further question—and did not decide—whether M-H's varying prices were justified, as M-H also strongly contended, on the ground that the lower of those prices were made in good faith to meet the equally low prices of its competitors (R. 2315).

Judgment in accordance with the court's opinion was entered on July 5, 1951 (R. 2316).* It was therein ordered and adjudged that Part III of the order be reversed and that Count III of the complaint be dismissed.

M-H's Business

M-H is, and for a number of years has been, one of the principal manufacturers of automatic temperature controls for oil burners of the gun and rotary types which are used in domestic heating plants (Com. Ex. 1, R. 1644).

Such controls consist in the main of three kinds (Com. Ex. 1, R. 1646):

(1) a thermostat, which is a control device placed in the room or space to be heated;

(2) a primary control, which is a device controlling the cycle of operation of the oil burner so as to start it and stop it when heat is needed or no longer needed (as governed by the thermostat), and to prevent a hazardous condition from occurring when there is a failure of combustion; and

(3) a limit control, which is a control device placed on the heating plant to prevent the temperature or pressure in the heating plant from exceeding a safe level.

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*That judgment was subsequently reiterated on September 18, 1951, as an incident to the court's disposition of the Commission's request for affirmance and enforcement of Parts I and II of its order. See our separate brief on jurisdiction.

An oil burner is ordinarily equipped with one set of controls, consisting of a thermostat, a primary control and a limit control. It is customary in the industry for such controls to be sold in sets (FF 4, 6, R. 2241-43).

It has been the policy of M-H to stress particularly sales to oil burner manufacturers (R. 863) who are the principal purchasers of oil burner controls (R. 39). It is only with such sales that Part III of the order is concerned (R. 2264).

M-H, a pioneer in the business of temperature control (R. 851), is well known in the industry because of its program for product development and its emphasis on service (R. 851-61). M-H's engineering and research work has resulted in the constant improvement of M-H's controls (R. 882-909) and in the steady decrease in the prices thereof, which dropped from $39.90 a set in 1929 to $13.75 in 1941, a decrease in price of 66% (R. 909-10).

M-H's Competitors

As the Commission found, M-H is engaged in "active and substantial competition" with other control manufacturers (FF 2, R. 2241). There are in the United States at least fifteen manufacturers of one or more of the three kinds of oil burner controls mentioned above, *i.e.*, thermostats, primary controls and limit controls (R. 48-51; 131-34, 227). Three such manufacturers, each of which manufactures and sells all three kinds of controls, have furnished M-H with especially keen competition in the sale of controls to oil burner manufacturers (R. 48-49; FF6, R. 2242-43), *viz.*:

Mercoid Corporation (Mercoid), which has made and sold oil burner controls since 1922 (R. 146-47);

Penn Electric Switch Company (Penn), which started to manufacture and sell oil burner controls in 1932 (R. 797); and

Perfex Corporation (Perfex), which commenced to sell limit controls in 1936 and which came out with a complete line of controls in 1937 (R. 212-13, 216).

Another important competitor of M-H is Detroit Lubricator Company (Detroit), a wholly owned subsidiary of American Radiator & Standard Sanitary Corporation, which, although manufacturing certain kinds of controls since 1933, did not offer a complete line until 1939 (R. 379, 381).

Thus, at the beginning of the 1930's, the only one of M-H's present major competitors then competing with M-H was Mercoid. During the next decade, M-H's three other principal competitors entered the industry and, notwithstanding the competition of older companies such as M-H and Mercoid, enjoyed a steady growth in the volume of their sales. Penn claimed that by 1941 it was the second largest control manufacturer (R. 798, 825-26). Perfex had such a substantial increase in its volume of sales that by 1941 it also considered itself to be the second largest manufacturer in the industry (R. 222, 231-32). Detroit's control business also increased after 1939, when its products were redesigned to sell in competition with those of the other control manufacturers (R. 394, 418-21).

Each of the principal control manufacturers solicited business from, and entered into contracts with, most of the oil burner manufacturers, including *all* the larger accounts (M-H—R. 59-60; Perfex—R. 749; Penn—R. 801-02). Since no important oil burner manufacturer used

exclusively the controls of a single control manufacturer, competition was "ever present" (R. 1528).

The Commission found that M-H, because of the large customer demand for, and public acceptance of, its controls, was able at all times to sell its controls at prices higher than those charged by its competitors (FF 5, R. 2242). Indeed, the Commission said that "no instance is shown in which respondent [M-H] actually undercut competitors' prices" (R. 2272).

M-H's share of the available business in automatic temperature controls for burners of the pressure and rotary types was reduced from 73% in 1937-38 to 60% in 1941 (R. 876-77). By 1941, the volume of M-H's sales of automatic temperature controls for all types of oil burners constituted only about 25% of the total sales of such controls (Com. Ex. 1, R. 1645).*

During those years there existed the keenest kind of price competition among control manufacturers (R. 77, 749, 801, 1295-96, 2192-93, FF 2, R. 2241). The total business of M-H's competitors increased, and, as has been shown above, the three new concerns which had entered the control field after 1932 enjoyed a steady growth in sales volume. Indeed, in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had used principally M-H's controls; and in the same year, 126 of M-H's

*Petitioner's repeated statements that it was stipulated that M-H in 1939, 1940 and 1941 sold approximately 60% of all automatic temperature controls sold in the United States (Br., pp. 10, 24, 48) are misleading. The 60% figure in the stipulation relates, not to all automatic temperature controls, but only to controls for oil burners of the pressure and rotary type for domestic heating plants (Com. Ex. 1, R. 1644). The same stipulation states that M-H in 1939, 1940 and 1941 sold approximately 25% of all automatic temperature controls for oil burners sold in the United States (Com. Ex. 1, R. 1645).

other oil burner manufacturer-customers also purchased competitive controls (R. 961-64, 2193-94).

M-H's Oil Burner Manufacturer Customers

The oil burner manufacturing industry was established in the early 1920's (R. 973, 1004, 1044, 1104). In 1941, according to M-H's records, there were upwards of 300 manufacturers in the field. Two of the largest, Quiet Heet Mfg. Co. and Aldrich Company, were not established until the middle 1930's (R. 495, 574, 1057).

The large majority of oil burner manufacturers are not engaged in fabricating the burners they sell, but rather in assembling the various parts thereof, including motors, pumps, transformers, controls, fans and blower wheels, the several parts usually being purchased by the oil burner manufacturers from different sources (R. 2182, 2309). Thus, oil burner manufacturers ordinarily furnish controls to their customers as parts of complete oil burners (R. 1108-09).

Oil burner manufacturers sell burners competitively at widely varying prices (*e.g.,* in 1941 from $45 to $114.50 (Resp. Ex. 171, R. 2141)), with selling prices determined in large part by varying costs of assembly, overhead, sales, installation and service (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48). It is and has been the usual practice in the industry for oil burner manufacturers to arrange for their supplies of equipment, including temperature controls, by annual contracts, negotiated in connection with their planning in advance for sales promotional activities (R. 808).

M-H's Prices

The fact that M-H has charged varying prices to oil burner manufacturers for controls was the basis for the charge of unlawful price discrimination made by the Commission in Count III of the complaint in this proceeding (R. 8-11).

M-H's prices to oil burner manufacturers for the year 1941, which are typical of the prices challenged by the Commission, were as follows (Com. Ex. 1, R. 1659):

Bracket	Annual Volume (Sets)	Net Price Per Set
1	50- 349	$17.35
2	350- 999	16.45
3	1,000-2,499	15.90
3A	2,500-4,999	15.35
4	5,000-7,499	14.90
4A	7,500-9,999	14.25
5	10,000-up	13.75

The Commission agreed with its Trial Examiner that M-H's prices in the discount bracket* and in brackets 1-3A, inclusive, made only due allowance for differences in M-H's costs and consequently were not violative of Section 2(a) of the Clayton Act (FF 18, R. 2255).

On the other hand, the Commission held that M-H's prices to customers in brackets 4, 4A and 5 and its prices in certain off-bracket sales, none of which was sought to be justified on a cost basis, resulted in unlawful price dis-

*An oil burner manufacturer who purchased less than 50 sets annually was given a discount from M-H's list price to wholesalers and was classified as being in what was known as the "discount bracket" (R. 2203).

crimination (FF 19, 20, 21, R. 2256-57), thus overruling the Trial Examiner's findings

(a) that the differences in such prices did not tend to injure competition; and

(b) that such prices were made in good faith to meet the lower price competition of M-H's competitors.

The court below, having concluded that the Commission had acted arbitrarily in rejecting the Trial Examiner's findings on the "injury to competition" point and that Part III of the order should therefore be reversed, found it unnecessary to decide the issue whether M-H's challenged prices were justified under the "meeting competition" proviso of Section 2(b) of the Act (R. 2315). As the court pointed out, "Unless its discriminations do or may tend to injure competition there is no need for M-H to justify them" (R. 2311).

SUMMARY OF ARGUMENT

I

The court below, having determined that the findings upon which Part III of the Commission's order was based were contrary to law and contrary to the evidence, was under a statutory duty to set it aside (Administrative Procedure Act § 10 (e)):

1. The court below, in reaching its decision, faithfully followed and correctly applied the standard set up by this Court for the guidance of courts of appeals in reviewing the decisions of administrative agencies (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951)).

2. The court below did not hold that Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, requires a showing that price discriminations have actually injured competition. It did hold, correctly, that the presumption of injury to competition which arises under the Act upon a showing of price differences does not preclude proof that there is *in fact* no probability of such injury to competition (*Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948)); and that the evidence in this case established the fact that M-H's varying prices did not result in the probability of injury to competition.

3. The court below correctly held that the Commission's findings that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers were contrary to the evidence. There is no relationship between prices for M-H controls and prices for oil burners equipped with such controls.

4. The court below correctly held that the Commission's finding that M-H's varying prices tended substantially to lessen competition among control manufacturers was contrary to the evidence. The Commission erred as a matter of law in determining that a seller, by meeting competition, injures or tends to injure competition (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951)).

II

The question whether the lower of M-H's varying prices were made in good faith to meet competition is not now

before this Court for consideration. Not only was the question not raised by the petition for a writ of certiorari (*Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242 (1918); *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205 (1949)), but it is a factual question (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951)) which was not reached or decided by the court below (*McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 468 (1947)).

ARGUMENT

I

THE UNANIMOUS REVERSAL BY THE COURT BELOW OF PART III OF THE COMMISSION'S ORDER SHOULD BE AFFIRMED.

As this Court recognized in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738 (1945), Section 2(a) of the Clayton Act does not prohibit all discriminations in price, but only those discriminations whose effect

> ". . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

In the instant case, not only the Trial Examiner and the dissenting Commissioner, but the unanimous court below, upon its review of the record as a whole, reached the

conclusion that M-H's varying prices did not tend to lessen competition. The reversal by the court below of Part III of the Commission's order was based squarely on its conclusion that the majority of the Commission had acted arbitrarily in making unsupported findings to the contrary.

Since, as is shown hereafter, those findings of the Commission majority were based on erroneous theories of law and were clearly contrary to the evidence, it is submitted that the court below could not properly have reached any other conclusion.

In view of the court's statutory duty to set aside any action of the Commission found, upon its review of the whole record, to be unsupported by substantial evidence, or to be arbitrary or otherwise not in accordance with law, and particularly in view of the standard set up by this Court in the *Universal Camera* case for the guidance of the courts of appeals in reviewing the decisions of administrative agencies, the court below had no alternative but to reverse Part III of the Commission's order and to dismiss Count III of the complaint. Administrative Procedure Act § 10(e) (5 U. S. C. § 1009(e)); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).

1. The court below correctly applied the decision of this Court in the *Universal Camera* case.

In *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), this Court held that the Court of Appeals for the Second Circuit had erred in deeming itself bound by the Board's rejection of its Trial Examiner's findings, and remanded the case to that court for reconsideration of the record, with instructions that it should (340 U. S. at 497):

> "accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."

Elsewhere in its opinion in the *Universal Camera* case, this Court indicated that reviewing courts should give a trial examiner's report "such probative force as it intrinsically commands" (340 U. S. at 495) and recognized "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case, has drawn conclusions different from the Board's than when he has reached the same conclusion" (340 U. S. at 496).*

In the instant case, as in the *Universal Camera* case, the administrative tribunal, with one member dissenting, rejected the findings of its Trial Examiner.

The court below in the instant case, in reviewing the decision of the Commission, was guided by the principles laid down by this Court in the *Universal Camera* case. The court below noted that, under the rule of that case, it was its duty to examine the record as a whole, including the rejected report of the Trial Examiner, in order to determine whether the evidence supporting the Commission's order was substantial (R. 2311). The court also indicated that the dissent of an experienced member of the Commission from the Commission's findings and conclusions was in itself a reason to scrutinize carefully the evidence relied upon to support the Commission's findings and conclusions

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*Although petitioner suggests (Br., pp. 84-85) that questions going to the weight of the evidence and the credibility of the witnesses are unimportant in this case, the fact is that numerous conflicts in the evidence were presented for determination and were determined by the Trial Examiner, as is shown by the Commission's extensive exceptions to the Trial Examiner's Report (R. 2212-39).

(R. 2311). The court recognized, however, that the findings of the Trial Examiner must be considered along with " 'the consistency and inherent probability of testimony' " (R. 2311), and that such findings are not " 'as unassailable as a master's' " (R. 2312). Clearly, as shown by its opinion, the court carefully followed the principles laid down by this Court, and was aware that those principles were intended to be applied with caution.

Thus guided, the court below came to the conclusion, from its examination of the record as a whole, that the Commission had acted arbitrarily in rejecting the Trial Examiner's findings to the effect that M-H's pricing practices had not tended substantially to lessen competition. The court did not hold that the Commission was arbitrary merely because it reversed the Trial Examiner. On the contrary, it held that the Commission was arbitrary because on the whole record, the Trial Examiner was clearly right and the Commission's findings were not supported by any evidence (R. 2312, 2315).

The court below did not misapply, but rather faithfully followed, the decision of this Court in the *Universal Camera* case. The Commission's position that the court gave more weight to the Trial Examiner's report than it ought to have given, and that the court merely substituted its judgment for that of the Commission, is without foundation. The court below did no more than perform its statutory duty to set aside such action, findings and conclusions of the Commission as it found, upon its review of the whole record, to be unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Administrative Procedure Act § 10(e), 5 U. S. C. § 1009(e).

In the *Universal Camera* case, after stating that a Court of Appeals must set aside the findings of an administrative agency when, upon its review of the record in its entirety, such findings are found not to be supported by substantial evidence, this Court said (340 U. S. at 490-91):

> ". . . Our power [*i.e.,* the power of the Supreme Court] to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." [See also *N. L. R. B.* v. *Pittsburgh Steamship Co.,* 340 U. S. 498, 503 (1951); *Radio Corp. of America* v. *United States,* 341 U. S. 412, 415 (1951)]

The court below did not misapprehend the standard established by this Court; it correctly applied that standard.

2. The court below correctly applied the test of probable injury to competition.

Petitioner's argument that the court below erred is predicated upon a fundamental misconception as to the significance of the evidence concerning the complete absence of effect upon competition of M-H's varying prices for controls. The court below did not, as stated by petitioner (Br., pp. 29, 53, 79), apply a test of actual injury, as dis-

tinguished from the probability* of injury to competition, nor is it our contention, as suggested by petitioner (Br., pp. 29, 50-51, 67-69) that the Act requires a showing that price discriminations have actually injured competition.

This Court has specifically held in the *Corn Products* and *Morton Salt* cases that it is not necessary for the Commission to show actual injury to competition, but that a probability of such injury is sufficient. As this Court pointed out in the *Corn Products* case (324 U. S. at 738):

> ". . . The statute is designed to reach such discriminations 'in their incipiency', before the harm to competition is effected. It is enough that they 'may' have the prescribed effect."

It is, therefore, not a defense under the statute for a respondent to show that there has been no actual injury to competition; he must show that there is no probability of such injury. But neither the *Corn Products* case nor the *Morton Salt* case stands for the proposition that the existence or non-existence of probability of injury to competition must be determined in a vacuum, solely as a matter of theorizing, and without regard to proof that the practices

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*The Commission concurs in the view that the words "may be" in the statutory phrase "may be substantially to lessen competition" etc. connote "reasonable probability" (Br., pp. 51-53). We, therefore, use the word "probability" as equivalent to the phrase "reasonable possibility" used in the *Morton Salt* case with the qualification (334 U. S. at 46) that it was to be read in the light of the statement in the *Corn Products* case that "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition" (324 U. S. at 738).

complained of do not *in fact* result in the probability of such injury*.

Nor does the *prima facie* case of injury to competition which arises under the statute upon a showing of price differences prevail over actual proof that there is *in fact* no probability of injury to competition. A respondent who charges different prices is, nevertheless, entitled to show the facts with respect to the effect, or lack of effect, on competition of such different prices. And if the evidence shows that the discrimination in price does not in fact result in the probability of inj to competition, then there is not a violation of the statute.

In reversing Part III of the Commission's order, the court below showed that it understood and applied the test established by this Court in the *Corn Products* and *Morton Salt* cases (R. 2315):

> ". . . it cannot be said that [M-H's] discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. *Cf. Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. And a mere pos-

*In the usual case it may be, as petitioner urges, that members of an administrative agency should be regarded as being better able to comprehend and answer the factual questions arising in an administrative proceeding than are members of a judicial tribunal (See, *e.g.*, Br., pp. 79, 83, 85, 88). Undue reliance on that theory, however, would not be justified in this proceeding. The Commission's Trial Examiner, having available to him what the petitioner describes as "a staff versed in the analysis of the economic matters we have discussed" (Br., p. 83), found that M-H's pricing practices had not tended substantially to lessen competition. In so far as concerns the difference of opinion between the Commissioners themselves, there is no basis in the record or in human experience for attributing to the majority any greater "expertness" than to the minority.

sibility of such injury is insufficient to sustain a charge of violation of the Act. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 742."

3. The court below correctly held that the Commission's findings that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers were contrary to the evidence.

Underlying much of the petitioner's argument on the subject of injury to competition among oil burner manufacturers is the wholly false premise that a discrimination in price between different purchasers is unlawful (in the sense of having the defined effect upon competition) merely because the purchasers are engaged in competition one with the other (see, *e.g.*, Br., pp. 30, 56-59, 65-67).

If that premise were sound, then further argument on this phase of the case would be futile; for it is an undisputed fact that M-H has sold its temperature controls at different prices to different purchasers who were engaged in competition among themselves in the sale of oil burners.

By the same token, however, if the premise is false, a large part of the petitioner's carefully constructed argument collapses completely; for if the fact that purchasers are in competition with one another does not necessarily involve, as a matter of law, the probability of injury to competition, then the petitioner's charge of illegality is not established merely by pointing out the obvious fact that any price discrimination (whether lawful or unlawful) benefits the recipient of the lower price (*e.g.*, Br., pp. 31, 48, 65, 66, 70, 73, 74).

The language of the Act is wholly inconsistent with the construction placed upon it by the petitioner. If it had been

the intent of the Congress to prohibit all price discriminations among competitive purchasers (other than discriminations justified by cost savings or by the seller's competition) that intent could and would have been expressed in the Act. Instead, the Act expressly restricts its prohibition to a situation

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . ."

There could not, of course, be any injury to competition among purchasers unless such purchasers are in fact in competition with each other; but to argue, as the Commission does (Br., pp. 58-59), that the mere existence of competition among purchasers precludes a seller from lawfully charging different prices to such purchasers is to disregard the fact that price discrimination, to be unlawful under the Act, must tend to have the defined effect upon competition. The Commission's position is contrary to everything that this Court, or any other court, has said on the subject.

In the *Morton Salt* case, this Court interpreted the Act as authorizing the Commission "to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition" (334 U. S. at 47). The Court did not there disregard the requirement that the discrimination among competing purchasers be such as may have "the defined effect on competition". On the contrary, the Court pointed out that the findings of the Commission in that case to the effect that there was a reasonable possibility of injury to competition were supported by the evidence (334 U. S. at 47-51)—specifically, the showing that the seller's differentials in the price of table salt between purchasers who

competed in the resale of such salt were "sufficient in amount to influence their resale prices" (334 U. S. at 47).*

Indeed, in the *Morton Salt* case, the Commission itself recognized, by the proviso in its cease and desist order exempting "price differences of less than five cents per case which do not tend to lessen, injure or destroy competition", that not all price discriminations between competing purchasers necessarily involve a probability of injury to competition (334 U. S. at 53).

The Commission observes (Br., p. 56, n. 35) that there is a distinction between price discriminations which are "substantial" and those which are not substantial. Manifestly, a substantial discrimination in price will more frequently be found to have the probability of having a substantial effect upon competition than an insubstantial discrimination. But the Act does not distinguish between substantial and insubstantial discriminations; it distinguishes between those which tend to have the defined effect upon competition and those which do not. In other words, the issue is the effect upon competition and not the amount of the discrimination.

If the term "substantial discrimination" is to be understood merely as a shorthand method of denoting a discrimination which tends substantially to lessen competition, we have no quarrel with it. The difficulty with petitioner's use of the term "substantial discrimination", however, is that petitioner loses sight of its true significance and fashions arguments predicated upon the wholly erroneous notion that the word "substantial" has some absolute significance in relation to the dollar or percentage amount of the price

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*Such a showing was made in the *Corn Products* case by a stipulation of the parties that the allowances in question were sufficient, if and when reflected in whole or substantial part in resale prices, to affect competition among the purchasers (324 U. S. at 742).

differential in question (see, *e.g.*, Br., pp. 30, 48) which can be translated into a mathematical formula for the determination of probable effect upon competition. Thus, petitioner argues, in effect (Br., pp. 60, 61):

(a) This Court, by holding in the *Morton Salt* case that a discrimination in price among competing purchasers of salt which amounted to as little as 10¢ per \$1.50 case (6⅔%) might have the defined effect upon competition, determined that any discrimination in price amounting to 6⅔% of the sales price of the commodity is a "substantial" discrimination which establishes, as between competing purchasers, probable injury to competition; and

(b) The price differentials of M-H controls in the present case in relation to selling prices of oil burners "roughly approximate the 6⅔% discount on the salt in the *Morton Salt* case"* and therefore constitute "sub-

*Although the only differentials in respondent's prices here under attack are those for which respondent was not found to have established cost justification, the petitioner's argument that such differentials are "substantial" is formulated on the basis of differentials which are not under attack. Thus in an effort to show that the ratio between the challenged differentials in the price of controls and the prices of assembled oil burners "roughly approximates the 6⅔% discount on the salt in the *Morton Salt* case", the petitioner refers to bracket differentials of M-H in 1941 of \$3.60 between brackets 1 and 5, and of \$2.70 between brackets 2 and 5, and then states that such differentials amounted, in relation to 1941 oil burner prices, to from 6% to 9% and from 4.5% to 6¾%, respectively (Br., pp. 60-61). In fact, the only 1941 bracket differentials here in question are the differentials between bracket 3A and lower price brackets, differentials which ranged from 45¢ to a maximum of \$1.60 (Com. Ex. 1, R. 1659). With reference to 1941 oil burner prices ranging from \$114.50 to \$45 (Resp. Ex. 171, R. 2141), the maximum price differential in M-H controls amounted to from 1.4% to 3⁵⁄₉%. In other words, on the basis of the Commission's own mathematical approach, the ratio of the maximum price differential to the lowest selling price was approximately the same as that of the 5¢ discount exempted by the Commission itself in the *Morton Salt* case to the \$1.50 selling price (3⅓%).

stantial" discriminations, which justify the Commission's order without any inquiry into the probable effect of such differentials upon competition.

Quite apart from the factual inaccuracies in petitioner's analysis of the "substantiality" of M-H's price differentials, petitioner's approach to the problem is clearly fallacious. The question to be decided is not whether the challenged price differentials can properly be described as "substantial", either in dollar amount or in terms of a percentage of sales price. The question is, rather, whether such differentials—whatever their amount—involve in fact a probability of substantial injury to competition.

If the competition in question were competition in the resale of such items as grocery store staples, generally sold at uniform competitive prices, it would hardly require extensive testimony to establish the probable effect upon such competition of price differentials even smaller than those in the *Morton Salt* case. As this Court observed in the *Corn Products* case (324 U. S. at 742):

> ". . . the price discriminations here are relatively substantial in a field where differences of a fraction of a cent in the price of candy are sufficient to divert business from one manufacturer to another . . ."

Where, however, the competition in question is competition in the sale of relatively expensive products, sold at widely varying prices, the actual or potential effect on that competition of a discrimination in the price of one of the component parts of the product remains a question of fact, to be determined upon the evidence.

The conclusion of the majority of the Commission that M-H's varying prices tended substantially to lessen competition among oil burner manufacturers purports to be based upon findings which may be summarized as follows:

(1) Differences in control prices necessarily affected oil burner manufacturers' sales and profits (FF 16, R. 2252-53; FF 22, R. 2260);

(2) Some oil burner manufacturers lost business to those of their competitors who "enjoyed" lower control prices from M-H (FF 16, R. 2253; FF 22, R. 2260); and

(3) Since oil burner manufacturers who paid lower prices for M-H's controls had an advantage in selling oil burners equipped with such controls in competition with other oil burner manufacturers who paid M-H's higher prices, those who paid such higher prices (FF 18, R. 2255)

> ". . . must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent [M-H] charge for oil burners equipped with respondent's [M-H's] automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales."

Those general findings, which form the "factual" basis of petitioner's argument on this phase of the case (Br., pp. 15, 31, 65, 66), are not supported by any evidence. The dissenting Commissioner pointed out the insufficiency of such findings when he said (R. 2280):

> "On the record I believe it to be impossible for the Commission to make a specific finding that the

effect of the [M-H's] discrimination was to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. A general finding is insufficient for this purpose."

(a) There is no relationship between prices for M-H's controls and prices for oil burners equipped with such controls.

At the very outset of this proceeding, the Commission, recognizing that there is not any causal connection between prices for controls and prices for oil burners, stipulated as follows (Com. Ex. 1, R. 1661):

> "Some manufacturers paying higher prices for respondent's [M-H's] automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's [M-H's] automatic temperature controls sold their oil burners.
>
> "Some manufacturers paying lower prices for respondent's [M-H's] automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying higher prices for respondent's [M-H's] automatic temperature controls sold their oil burners."

That the prices of oil burners did not depend upon the prices paid for controls is conclusively proved by the histories of two relatively new members of the oil burner industry, Quiet Heet Mfg. Co. and Aldrich Company. Although paying the highest prices for M-H's controls when they started in business, Quiet Heet and Aldrich were able to compete effectively with larger, well-established con-

cerns who were then getting M-H's lowest prices. At the time of the hearings before the Trial Examiner, Quiet Heet and Aldrich had become the largest oil burner manufacturers in the industry (R. 574).

Quiet Heet started selling oil burners in 1936, at which time it was paying M-H's highest price for controls. Despite that fact, it was able to sell the lowest priced burner on the market, thus underselling the so-called "old line or pioneer manufacturers" (R. 554; Resp. Ex. 185-E, R. 2164). By 1941, Quiet Heet was selling 25,000 oil burners a year and had the largest sales volume of any oil burner manufacturer in the industry (R. 496).

Aldrich Company started manufacturing oil burners in 1935 (R. 1057), and in 1936, when it first bought M-H's controls (R. 1058), paid M-H's highest price therefor (R. 1070). In 1935, Aldrich manufactured only 250 oil burners; but, by 1941, notwithstanding the competition of manufacturers who were receiving M-H's lower prices, it had increased the volume of its sales to over 20,000 oil burners annually (R. 1059). In 1941, for the first time, Aldrich received M-H's lowest price for controls (R. 1070).

Quiet Heet and Aldrich are not the only oil burner manufacturers whose experiences demonstrate the absence of relationship between control prices and oil burner prices. Several other oil burner manufacturers who, during 1941, were receiving M-H's lowest control prices (Resp. Ex. 185A-F, R. 2160-65) put out burners that were among the higher priced on the market (Automatic Burner Corp., R. 992; Petroleum Heat & Power Co., R. 1112; Williams Oil-O-Matic Heating Corp., R. 1044), while burners manufactured by concerns paying higher prices for M-H's controls

(Resp. Ex. 143, R. 2041) were selling in the lowest price field (Joseph Toker Co., R. 1135-36; Korth Oil Burner Corp., R. 1172).

The absence of relationship between control prices and burner prices is not hard to explain. Factors such as service costs, selling expenses, and other overhead items are of far greater signficance in the total cost of an oil burner than is the cost of the controls with which it is equipped (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48, 2313).

The absence of any relationship between control prices and oil burner prices is further confirmed by the results of a nation-wide survey of the prices paid by wholesalers and dealers for comparable domestic oil burners during the year 1941 (Resp. Ex. 171, R. 2133-41; R. 1266-85). That survey was made by Ross Federal Research Corporation, an independent commercial research organization which has had long experience in that type of work and whose findings have had wide acceptance (R. 1266-67). It dealt with a broad cross-section of the oil burner industry. The oil burner manufacturers, wholesalers and dealers who were interviewed in the course of the survey numbered 535 and were located in 15 different areas comprising the principal markets for domestic oil burners (R. 1268-69). The questionnaires (Resp. Ex. 172, R. 2143) and instructions (Resp. Ex. 173, R. 2144-48) used in making the survey were carefully worded so as to elicit accurate information and to insure that price comparisons were made only with respect to comparable burner units. As a further precaution, Ross requested verification of the prices reported by wholesalers and dealers from the oil burner manufacturers who supplied such wholesalers and dealers. Only price information so verified was used in formulating the

conclusions reached in the Ross Report (R. 1269-70).

The following table, which is derived from the Ross Report (Resp. Ex. 171, R. 2141), shows, for the year 1941, the range of prices charged to wholesalers for comparable oil burners by oil burner manufacturer-customers in each of M-H's price brackets:

Prices Charged Oil Burner Manufacturers by M-H for Controls		Bracket Differential Not Shown to Have Been Justified by Cost Savings	Range of Prices Charged Wholesalers by Oil Burner Manufacturers for Burners	
Bracket	Price		Low	High
1	$17.35	—	$50.00	$111.00
2	$16.45	—	45.00	96.20
3	$15.90	—	47.50	102.00
3A	$15.35	—	52.50	89.00
4	$14.90	$0.45	61.70	100.00
4A	$14.25	$1.10	55.00	101.25
5	$13.75	$1.60	45.00	114.50

The absence of any relationship between variations in M-H's control prices and oil burner prices is clearly apparent. For example, the prices charged for comparable oil burners by manufacturers who paid $17.35 to M-H for a set of controls ranged from $50 to $111, whereas the prices charged by manufacturers who paid $13.75 per set of controls ranged from $45 to $114.50. The difference in control prices paid to M-H by those two groups of customers was only $3.60, and yet the range in the prices charged by each group for oil burners amounted to over $60.

The highest price for a burner ($114.50) was charged by a manufacturer who paid M-H's *lowest* price ($13.75) for his controls. Such highest price was $69.50 more than the price charged by another manufacturer, who was paying exactly the same price for his controls, and it was also

$69.50 more than the price charged by a manufacturer who paid $2.70 *more* for his controls ($16.45).

Furthermore, it is shown that the price of the lowest priced burner sold by a manufacturer in each of four groups of customers who paid M-H $16.45, $15.90, $15.35 and $14.90, respectively, per set of controls, was $45.00, $47.50, $52.50 and $61.70, respectively. In other words, while the prices paid by such groups of manufacturers to M-H for controls *decreased* successively, the lowest prices charged by them for oil burners *increased* successively.

Thus, the Ross Report demonstrates strikingly the accuracy of the stipulation of the parties to the effect that there is not any connection between variations in M-H's control prices and the prices of oil burners.*

Taken together, the aforesaid stipulation (Com. Ex. 1, R. 1661), the overwhelming evidence from the trade itself —the oil burner manufacturers—and the Ross Report compel a conclusion directly contrary to the finding of the Commission (FF 22, R. 2260) that changes in the prices of controls result in corresponding changes in the prices of oil burners.

(b) No oil burner manufacturer lost business to a competitor because of M-H's varying prices for controls.

The Commission majority found that certain oil burner manufacturers who paid M-H higher prices for controls

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*While petitioner concedes (Br., p. 19) that the Ross Report indicates "in some instances" a lack of correlation between the prices paid for controls and the selling prices of burners, it makes a point of the fact that the report "showed that in 11 of the 15 areas surveyed the lowest dealer price was given by manufacturers in respondent's lowest price bracket". Petitioner neglects to point out that also in 11 out of the 15 areas surveyed, the *highest* dealer price was charged by manufacturers in respondent's lowest price bracket.

lost business to certain of their competitors (Quiet Heet is the only one identified by name) who paid M-H lower prices for controls. That finding does not support the Commission's charge of unlawful price discrimination because the Commission, with good reason, refrained from finding any causal connection between the loss of business by such oil burner manufacturers and M-H's varying prices for controls. Thus, the Commission majority found (R. 2260):

> ". . . oil-burner manufacturers [not identified] testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent [M-H], although the exact volume of such lost business could not be calculated."

While the Commission properly found that "oil burner manufacturers" [*i.e.*, some of them] lost business to Quiet Heet, *it did not find, and could not find, that they lost business because Quiet Heet paid lower control prices to M-H.* As the Trial Examiner found after an extensive review of the evidence before him (R. 2195-96), Quiet Heet's ability to take customers away from its competitors was entirely attributable to reasons that had nothing to do with the price of controls.

When, in 1936, Quiet Heet started manufacturing and selling oil burners on a small scale, it paid M-H's *highest* price for controls (R. 554). Yet within a few years, as stated above, it had become the largest oil burner manufacturer in the industry (R. 574). In 1936, the then well-established oil burner manufacturers were selling for around $95 oil burners equipped with controls for which

they paid M-H's *lowest* price (R. 556). In that year, Quiet Heet introduced on the market an oil burner, priced at $70, equipped with controls for which it paid M-H's *highest* price.

Despite its low-price policy, Quiet Heet made a profit from the time it started in business (R. 556). Samuel L. Peters, the proprietor of Quiet Heet, who was a witness for the Commission, explained how Quiet Heet, at the outset, was able to market its $70 burner at a profit, as follows (R. 556):

> "I think that was largely due to the fact that my competitors misunderstood the trend of the industry at that time, which was into volume production because the F.H.A. and a large volume building construction program had entered the picture. They still stuck to the old policy of trying to get as much as the traffic would bear out of the commodity, whereas I started out to merchandise it on a volume basis, effecting certain economies, making a few shortcuts here and there and trimming down my overhead and operating costs to the minimum."*

The "economies" and "shortcuts" effected by Quiet Heet were innovations in the oil burner industry. For example,

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*Peters testified (R. 574) that other oil burner manufacturers (especially, Aldrich, Toker and Korth)—some of them after a period of "knocking" Quiet Heet's policies—decided to work along similar lines, the result being that they became outstandingly successful. Peters commented on the oil burner industry as follows (R. 574):

> "It appears to me by studying the manufacturers in the business that there is a clearly defined line between those who made the grade and those who did not. The ones who made the grade worked along the lines that I indicated and the others just stayed where they were or folded up, or went out of the picture."

Quiet Heet, unlike other oil burner manufacturers, did not furnish any service to its dealers. Thus, Peters testified (R. 569):

> "We made up our mind that we would sell only to the competent organizations who knew enough to maintain their own service and knew how to install our equipment, so that we could eliminate entirely the item of field service which was a very costly item that was being furnished by other manufacturers who were getting much more money for the equipment."

Other examples of Quiet Heet's economies: It did only a limited amount of advertising, relying mainly on its dealers to advertise its product (R. 568, 569-70); it effected savings in connection with the packaging of its burner (R. 571); and it initiated the policy of selling for cash only, while other oil burner manufacturers sold on consignment, on open account, and used various other "costly methods of selling" (R. 573).

When in 1936, Quiet Heet reduced the going price for oil burners more than $20 *below* the price of its competitors, it was paying *more* for its controls than those competitors were (R. 554, 556). Obviously, M-H's prices to Quiet Heet for controls had nothing to do with Quiet Heet's ability to initiate its price-reduction program.

During the complaint period (1937-41), Quiet Heet paid, on the average, approximately $1.90 ($1.60 in 1941) less per set for M-H's controls than M-H's customers who received M-H's lowest cost-justified prices (Resp. Ex. 185, R. 2164; Com. Ex. 1, R. 1659). That small price advantage over some of its competitors cannot possibly explain why Quiet Heet was able to sell its burners (containing one set of controls) at a price that was eventually *$55 below*

the lowest price that prevailed for oil burners when it started in business (R. 504-505, 507, 556-57).

Peters, who was in a position to know, attributed Quiet Heet's ability to follow successfully a low-price policy to its revolutionary methods of doing business. Although he was a witness for the Commission, *he did not even mention the price of controls in connection with explaining his ability to reduce the price of oil burners* (R. 495-520; 553-76).

As will be shown by the analysis set forth below, the very evidence relied upon by the Commission (Br., pp. 71-74) establishes that no burner manufacturer lost business either to Quiet Heet or to any other competitor, or was injured in any way, because of M-H's varying control prices.

Herco Oil Burner Corporation—F. E. Herr, President of Herco, made the unsupported statement that the fact that M-H's controls cost Herco more than they did one of its competitors (Quiet Heet) made a difference in sales of Herco's oil burners in the New York territory. He stated, however, that he had no way of determining that effect "in dollars and cents" and said (R. 674):

> ". . . I wouldn't like to make a statement on that anyhow. Some business probably we could have secured but as to what volume or anything, I personally would not know."

That is not evidence of anything. Actually, the lower price paid by Quiet Heet in 1941 for M-H's controls could not have adversely affected Herco. In that year, Herco, which then equipped its burners with Mercoid controls except where customers specified M-H controls (R. 664), paid $15.90 a set for M-H's controls* (as against $13.50

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*Unless otherwise indicated, prices paid by customers to M-H for controls are taken from Resp. Ex. 185, R. 2160-65 and Com. Ex. 1, R. 1659.

a set for its Mercoid controls (R. 671; Resp. Ex. 152-C, R. 2049)). In the same year, Quiet Heet paid M-H $13.75 a set for controls, the difference in favor of Quiet Heet being $2.15 per set of controls. When it came to prices at which the two concerns sold their burners, however, there was a difference of $14, Herco's price on quantity orders being $59 (R. 675; Com. Ex. 152, R. 1941) compared to Quiet Heet's price of $45 (Com. Ex. 124, R. 1871). Thus, even if Herco had paid the same price for M-H's controls that Quiet Heet did, and had reduced the price of the Herco burner accordingly, the latter would still have been almost $12 more than Quiet Heet's.

Malleable Iron Fittings Company—Malleable objected to some oil burner manufacturers being given a "price preference" over concerns like Malleable (R. 535)

> ". . . so that it made it more difficult for us to compete with the other burners because our prices were higher."

Again, the facts do not bear out the charge. In the year 1941, the "price preference" operating against Malleable was at most $2.15 because in that year Malleable was paying $15.90 per set of controls whereas the lowest price for a set of M-H's controls that year was $13.75, which was the price that Quiet Heet was paying. That $2.15 difference in control prices is inconsequential when contrasted with the *$45 spread* between Malleable's lowest burner price of $95 during most of that year,* and Quiet

*Effective November 1, 1941, Malleable reduced its burner prices. Its cheapest burner was then priced at $82.00 (R. 531, Com. Ex. 148, R. 1914).

Heet's burner price of $50 (R. 505, 536; Com. Ex. 144, R. 1903).

The simple fact is that Malleable was reluctant to reduce its burner prices although its competitors did so (R. 536-37), and hence did not attempt to meet the competition of other oil burner manufacturers such as Quiet Heet (R. 539).

Oil Equipment Laboratories, Inc.—This concern was another of the "old fellows" in the industry (R. 579), which found itself adversely affected when Quiet Heet went into the oil burner business and brought about a general drop in the price of oil burners (R. 586-88). While complaining that his Company never got "an equivalent break" in control prices (R. 585), H. F. Rodler, General Manager of the Company, admitted that the difference between what his Company paid for M-H's controls and what Quiet Heet paid, namely $2.65, would not have enabled his Company to meet Quiet Heet's competition (R. 582):

> ". . . $2.65 would not have made the difference necessary. It would have made part of the difference but not enough."

Petitioner refers (Br., pp. 18, 20, 72) to the Penn Boiler and Burner Company as a manufacturer which was "unable to meet competition at the prices it paid respondent for controls (R. 681)", but the testimony referred to had nothing to do with any effect of M-H's varying prices upon competition in the sale of oil burners. It related to a situation in which the Penn Boiler and Burner Company (which had standardized on Mercoid controls) and some of its dealers found it profitable, in certain markets, to sell the

low-priced Quiet Heet burner as well as the high-priced Penn burner, and to add to their profits on occasion by switching the controls with which the respective burners were equipped (R. 682). There is not a scintilla of testimony that the Penn Boiler and Burner Company lost any burner sales because of any variation in the prices of M-H controls.

That is all there is in the record for the Commission's conclusion that competition among oil burner manufacturers was lessened because of M-H's varying prices for controls, and it doesn't amount to anything.

On the other hand, all the testimony of the oil burner manufacturers who actually said anything definite on the subject was to the effect that the sales of their oil burners were not injured by the fact that some of their competitors received somewhat better prices on controls from M-H. The following are typical examples of the unequivocal testimony of such witnesses:

> "Q. Did that fact [that some of M-H's customers who purchased controls in larger volume got somewhat better prices than your Company] hurt the sale of your oil burners?
>
> " . . .
>
> "A. No, it didn't." (Jeffrey of Acme Oil Burner Co., R. 937-38.)
>
> * * * * *
>
> "Q. Now, speaking generally of your competition, Mr. Westmont, has the fact that other oil burner corporations received better prices [from M-H] because of their volume hurt the sale of your burners, to your knowledge?
>
> "A. Not a bit." (Westmont of Wisconsin Oil Burner Co., R. 999.)
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> * * * * *

"Q. Were you aware of the fact, Mr. Bendix, that some of the Minneapolis-Honeywell's customers who purchased controls in larger volume got a somewhat better price than Electrol received?

"A. Yes.

"Q. And did that fact hurt the sale of Electrol Burners?

"A. No." (Bendix of Electrol, Inc., R. 1142.)

* * * * *

"Q. Have you been aware of the fact, Mr. Kraber, that some of the Minneapolis-Honeywell's customers purchased controls in larger volume and got a somewhat better price than your company?

"A. Yes, sir.

"Q. Did that fact hurt the sale of your oil burners?

"A. No." (Kraber of York Oil Burner Co., R. 1151.)*

The most that the Commission's evidence with respect to competition among oil burner manufacturers can be said to show is that there was one of them, Quiet Heet, which undersold competitors and thereby brought about a general lowering of oil burner prices. Indeed, according to one of Quiet Heet's competitors, Quiet Heet in one year drove the

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*Petitioner's reference to the testimony of this witness (Br., p. 16, n. 16) illustrates the constancy of its effort to fashion the facts to fit its theories. Thus, in referring to the many oil burner manufacturers who testified unequivocally that competition in oil burners was not affected by M-H's variations in price, petitioner states that one of these firms "admittedly lost a customer to Quiet Heet, which received lower control prices 'because of the price' (R. 1155)": However, reference to the record shows not only that the witness did not attribute any loss of business to the price of controls, but that he did not even identify the year in which the incident occurred, so that there is no basis whatever for petitioner's statement that Quiet Heet was then receiving lower control prices from M-H.

dealer price of oil burners down $50 (R. 579), or *well over 30 times* the challenged differential in M-H's control prices to oil burner manufacturers.

The Trial Examiner summed up all the evidence on the point in his finding that (R. 2195):

> ". . . it was the cutting of its oil burner price, and not the price paid for controls by 'Quiet Heet', that was the cause of the competitive situation referred to at that time."

It is significant that Quiet Heet is the *only* oil burner manufacturer whose competition was specifically claimed by the Commission to have hurt other oil burner manufacturers. As has been shown above, even the Commission did not find Quiet Heet's advantage over its competitors attributable to the fact that it was able, eventually, to obtain M-H's lowest price. Indeed, the growth of Quiet Heet's own oil burner business, notwithstanding the fact that it started in paying M-H's highest control price, is in itself a complete answer to the charge that M-H's varying prices had the effect of lessening competition among oil burner manufacturers.

As noted by the court below (R. 2315), petitioner's argument that oil burner competition was injured as a result of M-H's varying prices involves a failure to distinguish between competition in the sale of controls and competition in the sale of oil burners. That confusion on the part of petitioner is illustrated by the statement (Br., p. 74) that M-H objected to the sale of burners with its controls at a $5 increase in price over the same burner equipped with competitive controls "presumably because this would reduce the sale of such burners". The fact is, of course, that M-H

was interested solely in the sale of its controls, and that the imposition by the oil burner manufacturer of an unwarrantedly high extra charge for a burner equipped with M-H controls as against the same burner equipped with competitive controls might well induce the purchaser of the burner to specify the competitive controls—thereby causing a loss of business to M-H in the sale of controls to the oil burner manufacturer. The distinction between competition in the sale of controls and competition in the sale of oil burners is fundamental in this case.

Throughout the complaint period (1937-41), there was the keenest kind of competition between M-H and other control manufacturers, in the course of which not only were all control prices substantially decreased, but the original difference between M-H's prices and the lower prices of its competitors was steadily reduced (see Appendix, *infra*). That difference was obviously an important factor in competition in the sale of *controls* to oil burner manufacturers.

In so far as concerns competition in the sale of *oil burners*, however, the difference between M-H's prices and the lower prices of its competitors was wholly without effect. Oil burner manufacturers generally offered their burners for sale equipped with any make of controls desired by the purchaser, either without varying the price of the burners or, in some cases where individual manufacturers had standardized on competitive controls, with the imposition of an extra charge for burners equipped with M-H controls (R. 942, 975, 364-65, 1150-51, 2242). But the record is abundantly clear that the difference in cost to the oil burner manufacturer between M-H and competitive controls had no effect whatever on competition in the sale

of oil burners. The customer of the Williams Oil-O-Matic Corporation referred to by petitioner (Br., pp. 19, 67), for example, in purchasing the Williams Burner, specified Mercoid controls rather than pay the higher price charged by that manufacturer for burners equipped with M-H controls; but the oil burner that it purchased was the *Williams* burner, not a competitive burner.

The record shows that the proposition advanced by the Commission, *i.e.*, that a difference between the price of M-H controls to one oil burner manufacturer and the price of M-H controls to another oil burner manufacturer affected or tended to affect competitive selling between the two oil burner manufacturers, cannot be supported.

(c) The question whether M-H's price differentials tend substantially to injure competition among oil burner manufacturers does not involve consideration of the independent pricing policies of sellers of other oil burner equipment.

Petitioner's final argument on this phase of the case is that even if M-H's differentials in control prices may not by themselves substantially affect competition in the sale of oil burners, nevertheless, if the aggregate effect of price discriminations by all suppliers of oil burner parts and equipment is to create a tendency to injure competition in the sale of oil burners, then each seller who contributes to the aggregate cost advantage of the favored customer is responsible for the aggregate competitive result (Br., pp. 20-21, 30-31, 61-63).

That argument cannot withstand analysis.

In the first place, the price of oil burners is not determined merely on the basis of the aggregate cost of compo-

nent parts; costs of assembly, overhead, sales, installation and service are of far greater significance (R. 952-53, 997, 1044-45, 1087, 1111-12, 1146-48).

In the second place, the Act prohibits a discrimination in price only "where the effect of *such discrimination* may be substantially to lessen competition", etc. It does not, and could not properly, impose a test of legality based upon the effects of *other* price discriminations by *other* persons, acting independently of the seller whose discriminatory price is under attack.

In any event, the record in the present case is barren of evidence, and there are no findings, as to the effect upon competition in the oil burner industry of any discriminations in the prices of other parts or equipment. It is, therefore, a matter of speculation as to whether any such discriminations exist, and, if they do, whether they have in fact resulted in the probability of injury to competition in the sale of oil burners. If it were to be assumed that each price differential was lawful in and of itself, then it remains lawful notwithstanding the aggregate effect. Conversely, if suppliers of other parts are guilty of illegal discrimination, that illegality cannot be imputed to a seller whose independent price differential is lawful.

Petitioner's suggestion (Br., p. 63) that there is an analogy between supplying temperature controls for oil burners and supplying individual commodities for resale in a grocery store is wholly without merit. It is, of course, no answer to a charge of injury to competition in the sale of table salt to say that the purchasers affected by discriminatory salt prices are able to compete freely in the sale of other commodities. But this simply answers an argument that we have not made and do not make. There is no con-

tention in the present case that a probable injury to competition in the sale of oil burners would be saved from illegality by the fact that the ability of oil burner sellers to compete in the sale of other heating equipment was not affected. *Our point is that the practices complained of do not involve any probability of injury to competition in the sale of oil burners themselves.*

4. The court below correctly held that the Commission's finding that M-H's varying prices tended substantially to lessen competition among control manufacturers was contrary to the evidence.

At the root of the disagreement between the majority of the Commission and the Trial Examiner on the issue whether M-H's varying prices tended to injure competition lie the erroneous theories of the majority of the Commission that

(1) a seller, by meeting competition, causes "injury" to competition; and

(2) a seller's showing that the lower of his varying prices were made in good faith to meet the equally low prices of his competitors does not constitute a defense to a charge of unlawful price discrimination, but, on the contrary, in some mysterious way, affords irrebuttable proof of "injury" to competition—and hence *conclusively establishes* the Commission's charge of unlawful price discrimination.

Those theories were announced by the majority of the Commission for the first time in the *Standard Oil* case.*

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*41 F. T. C. 263, 270 *et seq.* (1945); order modified, Commissioner Mason dissenting, 43 F. T. C. 56, 59 (1946); *reversed, sub nom. Standard Oil Co. v. Federal Trade Commission,* 340 U. S. 231 (1951).

Illustrative of the Commission's position in that case is the following excerpt from its findings:

> "Based on the record in this case the Commission concludes as a matter of law that it is not material whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. . . . Accordingly the Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." (*In the Matter of Standard Oil Co.*, 41 F. T. C. at 281-82)

The Commission's decision in the *Standard Oil* case in 1945, which was not reversed by this Court until January, 1951, served as a precedent, so far as the Commission was concerned, for its decision in January, 1948, in the instant case.

The Commission was clearly following its erroneous reasoning in the *Standard Oil* case when it found, in the instant case, that M-H's "price discriminations" had diverted trade to M-H from its competitors and, therefore, had had a "substantial injurious effect upon competition" in the sale and distribution of controls (FF 19, R. 2256). That finding was amplified and explained by the Commission in its opinion (R. 2273), as follows:

> "The competitive effects of respondent's [M-H's] discriminatory prices on other manufacturers of controls are persuasively indicated by its own argu-

> ments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's [M-H's] discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent [M-H] from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law . . .".

Obviously, if M-H were to be prohibited from trying to divert trade from its competitors (*i.e.,* Mercoid, Penn and Perfex), it would be prohibited from competing with them. Such a result is not only not required by the Clayton Act, but is wholly inconsistent with the attainment of the objectives of the anti-trust laws, namely, the promotion and protection of free competition.

It is apparent that in reaching the conclusion set forth above, the majority of the Commission refused to give any application whatever to the "meeting competition" proviso of Section 2(b) of the Act. On the contrary, it found that when M-H made its showing under Section 2(b), *i.e.*, that it had lowered its prices in good faith to meet competition, it thereby proved injury to competition, and hence a violation of the Act.

The Commission's paradoxical theories with respect to Section 2(b) were rejected by this Court in the *Standard Oil* case, where it was held that the natural consequences of meeting competition in good faith do not constitute the kind of "injury to" or "lessening of" competition to which Section 2 of the Clayton Act refers (340 U. S. at 249-50).

Since this Court's decision in the *Standard Oil* case, it has been clear that if a seller sustains his burden of proof under Section 2(b) of the Act by showing that the lower of his varying prices were made in good faith to meet the equally low prices of his competitors, the defense thus established to a charge of unlawful price discrimination is not to be invalidated

(a) because the seller succeeds in securing or retaining, as against his competitors, business he would otherwise have lost;

(b) because the seller's customers who receive the seller's lower prices obtain a price advantage over their competitors who are also customers of the seller; or

(c) because the seller's customers pass along such price advantage to *their* customers, thus affecting (and, according to the Commission, "injuring") competition at the resale level.

It follows that the Commission erred when it held that competition was injured when M-H, in order to meet competition, reduced some of its prices below its other prices in order "to retain the business of certain customers or to secure business of others" (R. 2273). The extent of the Commission's error is fully apparent only when viewed in the light of the Commission's own statement that ". . . no instance is shown in which respondent actually undercut competitors' prices" (R. 2272).* Then it becomes clear that the

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*The fact is, as was recognized by the dissenting Commissioner, that M-H, pressed by competition and losing substantial amounts of business, "in good faith and what appears to be only ordinary common sense, *brought its prices down closer to the level of its competitors*" (R. 2278) [Emphasis supplied.]

"substantial injurious effect upon competition" of which the Commission complains (FF 19, R. 2256) is that M-H allegedly diverted business from its competitors by selling at prices that were *always higher* than those of its competitors! The fundamental error on the part of the majority of the Commission in finding "injury to competition" under such circumstances pervaded its entire decision.

The Commission majority's finding (FF 19, R. 2256) that M-H's varying prices "have tended to, and do, divert trade to the respondent [M-H] from its competitors and have had a substantial injurious effect upon competition", in addition to being wrong as a matter of law, is not supported by the record. As recognized by the court below (R. 2312), the evidence fully establishes the contrary. Thus, it was not disputed

(a) that throughout the complaint period there existed the keenest kind of price competition among control manufacturers (R. 77, 749, 801, 1295-96, 2192-93, FF 2, R. 2241);

(b) that the total business of M-H's competitors increased, and that the three new concerns which entered the industry after 1932 enjoyed a steady growth in sales volume (Penn—R. 798, 826; Perfex—R. 222, 231-32; Detriot—R. 418-21);

(c) that M-H's proportion of sales of controls for oil burners of the pressure and rotary type was reduced from 73% in 1937-1938 to 60%* in 1941 (R. 876-77) and its proportion of total sales of controls for all oil burners constituted only 25% in 1941 (Com. Ex. 1, R. 1645);

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*See footnote at p. 8, *supra*.

(d) that the prices charged for controls by M-H's competitors were generally lower than those of M-H and that there is no evidence of any undercutting of its competitors' prices by M-H (FF 5, R. 2242; R. 2203, 2272);

(e) that in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had used principally M-H's controls (R. 964); and

(f) that in that same year, 126 of M-H's other oil burner manufacturer-customers also purchased competitive controls (R. 963).

In attempting to support the Commission's finding, counsel for the Commission ignore all of those facts and rely upon fragmentary testimony to the effect that M-H, from time to time, was able to take business away from its competitors (Br., pp. 22-23, 77-79)*. In placing reliance upon such testimony, which merely confirms that control manufacturers were engaged in active competition, it is necessary for the Commission to disregard the evidence that M-H's competitors were taking substantial amounts of business from M-H, as shown above, and the finding of the Commission (FF 5, R. 2242; 2272) that M-H *never* undercut the prices of its competitors, but *always* sold at a premium price.

As the court below said (R. 2312):

> " . . . M-H was entitled to meet the competition built up in its field, and even if it did succeed in re-

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*It is far from clear from such testimony that M-H's ability to get the business in those isolated instances had anything whatever to do with the prices of M-H's controls.

> taining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition. . . ."

That the Commission's position with respect to injury to competition among control manufacturers is wholly theoretical and divorced from reality is demonstrated by the fact that, in support of that position, petitioner is forced to place its primary reliance upon the argument that the "inevitable tendency of the system would be to encourage burner manufacturers to concentrate their purchases in respondent as their single source of supply" (Br., pp. 32, 50, 75-77). Whatever might be said for that argument if we were dealing with abstract theories, in a factual vacuum, it has no basis whatever in the facts of this case, as was determined by the Trial Examiner (R. 2193-94, 2202-03) and the Court of Appeals (R. 2312-13).

In view of the overwhelming evidence summarized above and of the absence of *any* testimony to show that the differences in M-H's prices tended to lessen competition among M-H and its competitors, the court below was amply justified in holding that the Commission's finding of injury to such competition was not supported by substantial evidence.

II

THE QUESTION WHETHER THE LOWER OF M-H'S VARYING PRICES WERE MADE IN GOOD FAITH TO MEET COMPETITION IS NOT NOW BEFORE THIS COURT FOR CONSIDERATION.

In addition to its attack upon the decision of the court below that M-H's varying prices did not tend substantially to injure competition, petitioner also urges in its brief (pp. 2, 3, 7, 33, 89-95) that this Court should now determine that the lower of M-H's varying prices were not made in good faith to meet competition—a question which the court below expressly stated it did not reach (R. 2315).

If, as we believe we have demonstrated, the decision of the court below was correct, then there is not any occasion for this Court to consider M-H's additional contention in the court below that the lower of its varying prices were made in good faith to meet competition and, accordingly, that it had established a separate and complete defense, under Section 2(b) of the Act, to the charge of unlawful price discrimination. *Standard Oil Company v. Federal Trade Commission,* 340 U. S. 231 (1951).

If, however, this Court were to reach a conclusion different from that of the court below on the facts with respect to the probability of injury to competition from M-H's varying prices, the separate question as to whether the lower of such varying prices were made in good faith to meet competition would not be before this Court for consideration.

In its petition for a writ of certiorari, the Commission sought review of two questions and two questions only (Petition, p. 2):

(1) whether in a proceeding involving a charge of unlawful price discrimination under Section 2(a) of the Clayton Act, a finding by the Commission of injury to competition among a seller's customers is adequately supported by evidence showing that substantial price differentials have been given to competing customers; and

(2) whether the court below properly applied the standards of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), in holding that the Commission erred in its findings.

Rule 38, par. 2, of the Rules of this Court provides that

> ". . . Only the questions specifically brought forward by the petition for writ of certiorari will be considered. . . ."

And it has been repeatedly held that, upon a review by certiorari, this Court confines its consideration to the matter relied on in procuring the writ, except in extraordinary cases. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242 (1918). And see *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205 (1949); *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48 (1947). Nor is "a mere reference in a petition for certiorari to a ruling, without a request for review" sufficient to justify its consideration. *Conn. Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493, 496-97 (1939).

Furthermore, quite apart from the fact that the Commission did not, in its petition for a writ of certiorari, raise the "meeting competition" issue, the court below did not reach and did not decide that issue; and it is well settled

that this Court will not, save in extraordinary cases, consider a question urged by a petitioner which was not passed upon in the courts below. *McGoldrick* v. *Campagnie Generale Transatlantique,* 309 U. S. 430, 434 (1940); *Aetna Casualty & Surety Company* v. *Flowers,* 330 U. S. 464, 468 (1947).

In the only two cases relied on by petitioner in support of its position that the question should be considered here [*Kiefer-Stewart Co.* v. *Joseph Seagram & Sons,* 340 U. S. 211, 214 (1951); *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U. S. 469, 473-74 (1947)], the *respondent* raised the new matter not passed upon by the court below; the new matter raised "only issues of law not calling for examination or appraisal of evidence . . ." (340 U. S. at 214); and the facts pertinent to the new issue were "not seriously disputed . . ." (330 U. S. at 474). This case is entirely different. Here, *petitioner* seeks to raise the question not decided by the court below, and numerous questions of fact are unresolved.

If it were open to us to urge in this Court the defense of meeting competiton under Section 2(b) of the Act, that defense would afford a separate and independent ground for affirmance of the judgment of the court below.* M-H's prices have been determined each year so as to meet the competitive conditions that have always existed in the control industry (R. 916-17, 1022-30). Information as to prices charged by M-H's competitors was constantly being obtained, and prices were arrived at largely on the basis of

*Contrary to petitioner's assertion (Br., pp. 7, 14, 95), M-H's evidence with respect to meeting competition related to all price differences under attack, as set forth in M-H's brief in the court below, at pages 44-54.

such information (R. 1021-22). Like its competitors, M-H has found that competitive conditions in the industry change continually and that it is, therefore, necessary to change prices to conform to such conditions (R. 916). Indeed, in every year during the complaint period (1937-41), M-H changed all of its prices (Com. Ex. 1, R. 1659).

This Court has, however, made it clear that the sufficiency of a showing of good faith meeting of competition is a factual problem to be resolved in each case. Thus in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945), this Court was explicit in pointing out that the change in the language of Section 2(b) effected by the Robinson-Patman Act

> ". . . was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination" (324 U. S. at 752-53).

And in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951), this Court again pointed out that the meeting-competition defenses failed in both *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945), and in the *Staley* case because of the "insufficiency of the seller's evidence to establish its defense . . ." (340 U. S. at 243). These factual disputes—a resolution of which has consistently been held to be an indispensable ingredient in passing upon the sufficiency in law of a meeting-competition defense—have not been reviewed by the court below in the present case.

Petitioner urges (Br., pp. 7, 33, 89-95) that the *Staley* case stands for the proposition that, as a matter of law,

the defense afforded by Section 2(b) of the Act is not available as justification for a "general system of competition." In the *Staley* case, however, this Court held that the defense of good faith meeting of the lower price of a competitor was not available as a justification of the basing-point method of pricing used in that case, not because every pricing "system" involving price differentials is unlawful *per se,* but because the Court determined on the facts that the system there in question necessarily involved discriminatory prices meeting the *higher* prices of a competitor, as to which Section 2(b) of the Act did not afford any defense (324 U. S. at 754-56). As this Court said (324 U. S. at 756):

> "The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there; but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system . . ."

The pricing practices complained of in the instant case do not involve either the basing-point method of pricing or any other "system" open to attack on similar grounds. On the contrary, the record shows, and the Trial Examiner found (R. 2203), that in M-H's price brackets here under attack, M-H's prices have been made to meet the lower price competition of competitors.

Accordingly, the question whether M-H has sustained its separate defense that the lower of its varying prices were made in good faith to meet competition is not now before this Court for consideration.

CONCLUSION.

The judgment of the court below reversing Part III of the Commission's order and dismissing Count III of the complaint should be affirmed.

Respectfully submitted,

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October 8, 1952.

APPENDIX

Comparison of Prices Extended by M-H and Its Competitors to the 88 Oil Burner Manufacturers Referred to in the Commission's Case

M-H's Prices*	Range of Competitive Prices**		Lowest Competitive Price
1937			
Bracket 1—$23.85	Penn	$19.74–21.08	$17.10
	Perfex	19.80–20.65	
	Mercoid	17.10–18.95	
Bracket 2—$22.60	Penn	$17.25–21.08	$16.60
	Perfex	18.60–19.80	
	Mercoid	16.60–17.85	
Bracket 3—$21.30	Penn	$15.73–21.08	$15.00
	Perfex	17.15–18.65	
	Mercoid	15.00–18.20	
Bracket 4—$19.85	Penn	$17.25	$16.15
	Perfex	No sales	
	Mercoid	16.15–16.60	
Bracket 5—$17.85	Penn	$17.25	$14.25
	Perfex	14.25	
	Mercoid	14.70–16.15	
Bracket 6—$16.55	Penn	No sales	$15.00
	Perfex	No sales	
	Mercoid	$15.00	
1938			
Bracket 1—$21.05	Penn	$16.85–19.25	$14.65
	Perfex	18.40–20.75	
	Mercoid	14.65–17.25	
Bracket 2—$19.35	Penn	$15.15–19.25	$15.15
	Perfex	17.15–18.40	
	Mercoid	15.50–16.25	

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*For derivation of M-H's prices, see Com. Ex. 1, R. 1659 and Resp. Ex. 185, R. 2160-65.

**For derivation of competitive prices, see Resp. Ex. 182, R. 2159 (Penn); Resp. Exs. 23, 43 and 70, R. 2009-11 (Perfex); Resp. Exs. 73-78, R. 2013-19; Resp. Ex. 149-C, R. 2046; Resp. Ex. 152A-E, R. 2047-51; Resp. Ex. 153, R. 2052-2102; Resp. Exs. 155-167, R. 2103-31; and R. 1292, 1305, 1311-12 (Mercoid).

M-H's Prices	Range of Competitive Prices		Lowest Competitive Price
Bracket 3—$18.35	Penn	$16.75–18.25	$14.65
	Perfex	15.55–17.65	
	Mercoid	14.65	
Bracket 4—$17.25	Penn	$16.85	$14.65
	Perfex	16.05–17.15	
	Mercoid	14.65	
Bracket 5—$16.25	Penn	$14.53	$13.95
	Perfex	13.95	
	Mercoid	14.65	
1939			
Bracket 1—$18.10	Penn	$16.55	$14.65
	Perfex	16.95	
	Mercoid	14.65–16.25	
Bracket 2—$17.25	Penn	$14.65–17.30	$13.50
	Perfex	13.50–16.95	
	Mercoid	14.65–15.60	
Bracket 3—$16.65	Penn	$17.30–19.25	$13.00
	Perfex	14.65–16.20	
	Mercoid	13.00–15.20	
Bracket 4—$15.95	Penn	$15.85	$13.00
	Perfex	14.65–15.70	
	Mercoid	13.00–14.65	
Bracket 5—$14.90	Penn	$14.65	$13.00
	Perfex	13.50	
	Mercoid	13.00–14.65	
1940			
Bracket 1—$18.10	Penn	No sales	$14.80
	Perfex	$16.35	
	Mercoid	14.80–15.45	
Bracket 2—$17.25	Penn	$15.80–17.30	$14.20
	Perfex	No sales	
	Mercoid	14.20–15.45	
Bracket 3—$16.65	Penn	$15.80	$13.05
	Perfex	13.05–16.35	
	Mercoid	13.50–14.80	
Bracket 3A—$16.25	Penn	$15.15	$13.50
	Perfex	15.15	
	Mercoid	13.50–14.20	

M-H's Prices	Range of Competitive Prices		Lowest Competitive Price
Bracket 4—$15.85	Penn	$15.15–15.80	$13.50
	Perfex	14.15	
	Mercoid	13.50–14.20	
Bracket 4A—$15.15	No comparable competitive prices available*		
Bracket 5—$14.65	Penn	$14.30–17.30	$13.05
	Perfex	13.05–13.70	
	Mercoid	13.50	
1941			
Bracket 1—$17.35	Penn	$16.35–17.30	$13.70
	Perfex	16.35	
	Mercoid	13.70–15.75	
Bracket 2—$16.45	Penn	No sales	$13.70
	Perfex	No sales	
	Mercoid	$13.70–15.15	
Bracket 3—$15.90	Penn	$15.55–16.35	$13.05
	Perfex	13.05–16.35	
	Mercoid	13.50–15.45	
Bracket 3A—$15.35	Penn	$14.90	$13.70
	Perfex	13.70	
	Mercoid	13.70–14.90	
Bracket 4—$14.90	Penn	$14.90–15.55	$13.70
	Perfex	13.70–15.00	
	Mercoid	13.70	
Bracket 4A—$14.25	Penn	No sales	$13.50
	Perfex	No sales	
	Mercoid	$13.50	
Bracket 5—$13.75	Penn	$13.30–14.90	$13.05
	Perfex	13.05–13.70	
	Mercoid	13.50–13.70	

*None of the 88 oil burner manufacturers fell within M-H's bracket 4A for the year 1940 (Resp. Ex. 185, R. 2160-65).